



**Njuguna (As the Administrator of the Estate of William Njuguna Mariga (Deceased))
v Ndungu & 3 others (As Legal Representatives of Ruth Kanini Ndungu (Deceased))
(Civil Appeal E008 of 2020) [2024] KECA 1523 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1523 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL E008 OF 2020
MA WARSAME, PO KIAGE & FA OCHIENG, JJA
OCTOBER 25, 2024**

BETWEEN

**JAMES MACHARIA NJUGUNA APPELLANT
AS THE ADMINISTRATOR OF THE ESTATE OF WILLIAM NJUGUNA
MARIGA (DECEASED)**

AND

**DAVID CHEGE NDUNGU 1ST RESPONDENT
ELIJAH MWANGI NDUNGU 2ND RESPONDENT
MARY WANINI NDUNGU 3RD RESPONDENT
SAMUEL MARITE NDUNGU 4TH RESPONDENT
AS LEGAL REPRESENTATIVES OF RUTH KANINI NDUNGU (DECEASED)**

*(Being an appeal from the Judgment of the Environment & Land Court of Kenya at
Nyahururu (M.C. Oundo, J.) delivered on 6th August 2020 in ELC Case No. 120 of 2017 (O.S))*

JUDGMENT

1. The appellant herein in his originating summons dated 9th September 2013, sued Ruth Kanini Ndungu hereinafter, “the deceased” who is presently represented by the respondents herein. The dispute herein is with regard to 12 acres of land parcels Nyandarua/Malewa/957, 958 & 959 hereinafter, “the suit property”. The appellant sought the following orders:
 - a. That the appellant had become entitled, by adverse possession, to the suit property which was registered in the name of the deceased.
 - b. That the appellant be registered as the proprietor of the suit property.



1. The appellant's case was that his deceased father's title deed was for land parcel No. Nyandarua/Malewa/632 which had been subdivided from plot No. 432 Malewa Scheme. He told the court that he grew up on plot 432 which had distinct boundaries with the neighbouring parcels. He further stated that there was a clear boundary with a barbed wire fence between parcels 432 and 433 since 1963 when allocation was done by the Settlement Fund Trustee (SFT).
2. He testified that his father and the deceased's husband had erected the barbed wire fence and planted eucalyptus trees along the said fence and they had never had a dispute over the boundary.
3. He further stated that plot 432 was subdivided into plots 632, 633, and 634, while plot 433 was subdivided into plots 957, 958, 959, 960, and 961. He told the court that the dispute was with regard to plot 632.
4. The appellant conceded that the deceased had lodged a boundary dispute with the District Land Registrar's office on 25th September 2008 concerning plot 632. As a result, the Land Registrar visited the disputed land on 14th November 2008.
6. The appellant was apprehensive that if the Registry Index Map (RIM) was used, he stood to lose the suit property which he had long occupied and utilized since 1963. He told the court that the RIM did not show the original boundaries as were occupied on the ground. He stated that they were entitled to the suit land by operation of law as they had used the same for over 65 years without interruption.
7. The appellant called a Government Surveyor who testified as PW2. He relied on his report dated 28th February 2019. The witness told the court that he had visited the suit property on 27th February 2019, where he took measurements thereof and found that it measured approximately 12 acres. He also told the court that the appellant was the person in occupation of the suit property. He also stated that the suit property had been cultivated, and a few trees had been planted thereon.
8. On cross-examination, he told the court that although the boundary of the appellant's parcel 632 was present on the RIM, it was not marked on the ground. He stated that although it had been difficult to identify a furrow on the land, they found furrows which had been dug in the 1960s in some places. However, he told the court that he did not see any such furrows on the suit property.
9. In response to the summons, the deceased stated that she was registered as the proprietor of Nyandarua/Malewa/958 & 959 on 17th August 2004, having acquired the same from her deceased husband who died in the year 2002. She further stated that on 16th July 2007 Nyandarua/Malewa/957 was sub- divided into Nyandarua/Malewa/2106 & 2107.
10. The deceased conceded that although the appellant had been in possession of the suit property, there had been a long-standing boundary dispute between them after the appellant claimed that the boundary was on a part of his land.
11. She told the court that they had been heard by the Land Disputes Tribunal, Kipipiri division, and by a letter dated 28th May 2009, she was informed by the tribunal that the suit property was hers. As a result, she paid Kshs.1,250 to the District Land Registrar to have the boundary fixed. However, the Land Registrar never went to measure the land and fix the boundary issue despite being issued with summons dated 25th September 2009, 5th August 2009, 22nd May 2012, 31st May 2013, and 23rd July 2013.
12. The respondent stated that while the issue was still pending before the Land Registrar, the appellant filed the instant suit.



13. The respondent told the court that after the Land Registrar refused to fix the boundary, she filed a case against the District Land Commissioner through Nyahururu PMCC No. 34 of 2011. She then paid a further Kshs. 12,000 for the Land Registrar to fix the boundary on 11th July 2013.
14. The respondent that the suit property belonged to her and that she had been using it since 1965 and paying land rates.
15. When the court conducted a site visit to the suit properties, it observed that the disputed land was not occupied and that it only had a few maize plants and trees growing thereon. The area was fenced with blue gum trees and barbed wire. There was also a repaired perimeter fence bordering the road and a new barbed wire to reinforce the old one. The land was neglected and had tall grass and bushes growing thereon. There were about seven furrows on the land.
16. Upon considering the parties' pleadings, oral testimonies, the evidence tendered, and their written submissions, the learned Judge held that the deceased having become the registered proprietor of the suit property on 10th August 2004, the suit herein had been filed before the expiry of 12 years on 9th September 2013.
17. In dismissing the appellant's suit with costs to the deceased, the learned Judge held that the appellant had not proved on a balance of probabilities that the right of action against the deceased had accrued as at the time of filing the suit: pursuant to the provisions of Section 38 as read with Sections 7, 9 and 13 of the *Limitation of Actions Act*.
18. Being dissatisfied with the impugned judgment, the appellant appealed to this Court raising the following grounds:
 - a. The learned Judge erred in holding that the appellant's right of action had not accrued despite evidence of his possession exceeding 12 years.
 - b. The learned Judge erred in failing to appreciate that the suit properties were a subdivision of plot 633 of which the appellant had been in occupation of 12 acres thereof.
 - c. The learned Judge erred in failing to uphold the appellant's claim for adverse possession.
19. When the appeal came up for hearing on 15th May 2024, Ms. Ndegwa, learned appeared for the appellant, whereas Mr. Waichungo, learned counsel appeared for the respondent. Counsel relied on their written submissions which they briefly highlighted.
20. Ms. Ndegwa submitted that the subdivision was done in 2004 while the suit was filed in 2013. Counsel was of the view that although subdivision may be a dealing in land, and even though the land was registered in the names of other persons, it did not interfere with the occupation.
21. In his written submissions, the appellant reiterated that he had been in quiet and uninterrupted possession and enjoyment of the suit property since 1963 to the date of filing the suit without any interruption. He only became aware that the suit property formed part of the respondent's land when the respondent lodged a boundary dispute.
22. The appellant submitted that the respondent's contention that the 12 years required for the institution of a claim for adverse possession had not lapsed was addressed in the ruling dated 14th November 2014, from which no appeal was preferred. He pointed out that the issue was Res judicata and could not be relitigated. He relied on the cases of Njuguna Ndatho v Masai Itumo & 2 Others [2002] eKLR and Titus Kigoro Munyi v Peter Mburu Kimani [2015] eKLR to buttress this submission.



23. The appellant further submitted that a change in ownership of a parcel of land does not affect the rights acquired under the doctrine of adverse possession. He faulted the learned Judge for holding that the respondent became the registered owner of the suit properties in 2004 while the suit was filed in 2013, 9 years later and before the expiry of 12 years. He submitted that the respondent's husband became the registered proprietor of the suit properties in 1992, which was more than 12 years. To buttress this submission, he relied on the cases of *Mwangi Githu v Livingstone Ndeete* [1980] eKLR.
24. Opposing the appeal, Mr. Waichungo pointed out that the 12 years would run from the date when the deceased became the registered owner. Counsel submitted that the appellant's entry was originally on the understanding that he owned the suit property, which was a mistaken assumption.
25. In their written submissions, the respondents submitted that the appellant did not tender evidence in support of his continued possession of the suit property. According to them, the appellant only started to interfere with the suit property after the death of her husband in 2002. There was nothing on the land to show that the appellant had been in occupation thereof for over 50 years. There were no structures or developments on the suit property.
26. The respondent further submitted that the court site visit of the suit properties showed that the trees on the suit property belonged to the respondent while the maize plantations belonged to the appellant, which was not indicative of the appellant's occupation of the suit property for more than 12 years.
27. The respondent submitted that the green cards showed that the deceased was registered as the proprietor on 10th August 2004. Therefore, the appellant having failed to sue her in her capacity as her husband's legal representative, the action against her for adverse possession would not yet have accrued in 2013.
28. The respondent submitted that immediately the appellant started interfering with the suit property, the deceased filed the tribunal case which resulted in a boundary dispute that is pending before the Land Registrar.
29. The respondent pointed out that the appellant had submitted that he did not know that he was on the respondent's land until the boundary dispute arose. Therefore, the appellant could not succeed in a claim for adverse possession if he did not know that he was in actual possession of the respondent's land.
30. The respondent further submitted that they had planted trees on the suit properties which was an indication that the appellant was not in a non-permissive actual possession of the suit property which was hostile to the respondent and unequivocally exclusive and unmistakable *animus possidendi*.
31. The respondent submitted that there was no evidence that the respondent or their predecessor was dispossessed of or discontinued possession of the suit property for 12 years. They urged the court to dismiss the appeal with costs.
32. This being a first appeal, it is our mandate to re-evaluate the evidence tendered before the trial court and arrive at independent findings and conclusions, bearing in mind that we did not have the occasion to see or hear the witnesses and make due allowance for the same. In the case of *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR the court restated this requirement as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give



reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2000) 2EA 212 wherein the Court of Appeal held, inter alia, that: “On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

33. We have carefully and anxiously considered the record of appeal, the grounds thereof, the rival submissions by counsel, the authorities cited, and the law. The issue for determination is whether or not the appellant was entitled to the suit property, by way of adverse possession
34. It is common ground that the parties herein are neighbours and they share a boundary to their respective parcels of land. Article 40 as read with Article 64 of *the Constitution* allows citizens to acquire and own land, through a freehold or a leasehold tenure. Article 65 on the other hand allows non-citizens to acquire and own land, through a leasehold tenure. However, one can also acquire land through the doctrine of adverse possession.
35. The Black’s Law Dictionary, Ninth Edition defines “adverse possession” thus:
 1. “The enjoyment of real property with a claim of right when the enjoyment is opposed to another person’s claim and is continuous, exclusive, hostile, open and notorious.
 2. The doctrine by which title to real property is acquired as a result of such use or enjoyment over a specific period of time.”
36. In the case of Elphas Cosmas Nyambaka v Charles Angucho Suchia [2020] eKLR, this Court held that:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a period of 12 years or more. The process spirals into action fundamentally by default or inaction on the part of the registered owner of the parcel of land. The essential requirements being that the possession of the adverse possessor is neither by force or secrecy nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the registered owner.”
37. The law on adverse possession is provided for under the *Limitation of Actions Act*. Section 7 of the Limitations of Actions Act provides that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
38. In the case of Kasuve v Mwaani Investments Limited & 4 Others 1 KLR 184, this Court held that:

“And in order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – Wanje v Saikwa (No 2) [1984] KLR 284.



A title by adverse possession can be acquired under *Limitation of Actions Act* for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession – (see *Githu v Ndeete* [1984] KLR 776).”

39. Section 38 of the Act provides that:

- “(1) Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

40. Further, Section 13 of the Act provides that:

- (1) “A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.
2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.
3. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land.”

41. The appellant contended that he had been in occupation of the suit property for over 65 years and the fact that the deceased was registered as the owner thereof did not extinguish his claim for adverse possession. Section 16 of the Act provides that:

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”

42. It is common ground that the deceased acquired the suit property from her late husband. In 2004, the suit property was transferred to the deceased, not as the administrator but as a beneficiary of her late husband.



43. In the case of *Kasuve v Mwaani Investments Limited & 4 Others*, (supra), the court further held that:
- “In our view, the proper defendant to the plaintiff’s claim should have been the estate of Ndolo through the executrix of the will and not the beneficiaries. The appellant filed the suit after the estate left the hands of the executrix and after the administration of the estate had been wound up. In our view, the suit to recover land by adverse possession was not maintainable against some of the beneficiaries of the estate of Ndolo.”
44. In the circumstances, we find that the cause of action for adverse possession could only accrue to the appellant from 2004 when the deceased became the registered owner of the suit property. Given that the appellant filed his suit for adverse possession in 2013, we find that the statutory period of 12 years for an action for adverse possession to accrue had not lapsed.
45. We feel obliged to address one other aspect of this appeal: that is the question concerning the ingredients of the doctrine of adverse possession. The said elements are contained in the Latin maxim *nec vi, nec clam, nec precario*, which means, “without force, without secrecy, without permission”. In this instance, the appellant conceded that his occupation of the suit property was on the assumption that it was his parcel of land. He did not know that the land belonged to the deceased until 2009 when she filed a boundary dispute.
46. In the case of *Mate Gitabi v Jane Kabubu Muga & Others, Civil Appeal No. 43 of 2015* (unreported), the court held that:
- “For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land.”
47. Similarly, in the case of *Samuel Kihamba v Mary Mbaisi* [2015] eKLR, this Court stated thus:
- “Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land”
48. The law and requirements for adverse possession were reiterated in the case of *Mbira v Gachuhi*, [2002] IEALR 137 where it was held that:
- “..... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non- permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption....”
49. It follows that adverse possession contemplates two concepts; possession and discontinuance of possession. The proper way of assessing proof of adverse possession is whether or not the deceased had been dispossessed or had discontinued her possession for the statutory period, and not whether or not the appellant proved that he had been in possession for the requisite number of years.
50. In the circumstances, we find that the appellant failed to demonstrate that he had been in non-permissive, continuous, and uninterrupted occupation of the suit property



51. In the result, we hold that the appellant’s claim for adverse possession was misplaced because, having operated on the presumption that he was the owner of the suit property, his claim for adverse possession could only have arisen from 2009 when he first learned that the suit property belonged to the deceased.

52. We find that the appeal herein lacks merit. The same is dismissed with costs to the respondents.
Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

M. WARSAME

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

